STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Owens, P.J., and Gleicher and Stephens, JJ.

MICHIGAN COALITION OF STATE EMPLOYEE UNIONS; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA and its LOCAL 6000; MICHIGAN CORRECTIONS ORGANIZATION/SEIU MICHIGAN PUBLIC EMPLOYEES/ SEIU LOCAL 517M; MICHIGAN STATE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 5; MICHIGAN AFSCME COUNCIL 25; and ANTHONY MCNEILL, RAY HOLMAN, ANDREW POTTER, ED CLEMENTS, AMY LIPSET, WILLIAM RUHF, KENNETH MOORE, RUSSELL WATERS, MARK MOZDZEN and KATHLEEN WINE, on behalf of themselves and a similarly situated class,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN; MICHIGAN STATE EMPLOYEES RETIREMENT SYSTEM; MICHIGAN STATE EMPLOYEES RETIREMENT SYSTEM BOARD; MICHIGAN DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET; JOHN NIXON, AS THE DIRECTOR OF THE MICHIGAN DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET; PHIL STODDARD, AS THE DIRECTOR OF THE OFFICE OF RETIREMENT SERVICES OF THE MICHIGAN DEPARTMENT OF TECHNOLOGY, MANAGEMENT AND BUDGET; AND ANDY DILLON, AS THE TREASURER OF THE STATE OF MICHIGAN,

Defendants-Appellants. /

Supreme Court No. 147758

Court of Appeals No. 314048

Ingham Circuit Court No. 12-17-MM

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Matthew Schneider (P62190)
Chief Legal Counsel

Larry F. Brya (P26088)
Special Assistant Attorney General

Patrick M. Fitzgerald (P69964)
Frank J. Monticello (P36693)
Joshua O. Booth (P53847)
Assistant Attorneys General
Attorneys for State of Michigan
Defendants–Appellants
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 373-1162

Dated: May 21, 2014

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

The Coalition Plaintiffs' argument rests on the theory that the word "compensation" in article 11, § 5 of the Constitution includes pensions. But § 5 *itself* lists "compensation" and "pensions" as separate items. The Coalition has no answer to this dispositive point. It simply asserts that the paragraph of § 5 that lists "compensation" and "pensions" as separate items "obviously" sheds no light on the meaning of "compensation" because the paragraph was added in 1978. But the Coalition never explains how the passage of 15 years after the adoption of § 5 changes the ordinary meaning of "compensation." Quite the opposite, this timeline highlights what the State has asserted all along: in the ordinary parlance, from 1940 through 1963 and beyond, pensions were not considered to be compensation, which explains why pensions had to be added and listed separately from compensation in 1978.

Further, when voters in 1940 created the Commission with the authority to "fix rates of compensation" and "regulate all conditions of employment" of classified State employees, their purpose was to end the "spoils system," not to establish a pension plan. *Council No. 11, AFSCME v Civil Serv Comm*, 408 Mich 385, 400–401; 292 NW2d 442 (1980). Consistent with this, the Legislature enacted a retirement plan for state employees in 1943 PA 240 and amended that statute over 20 times before 1963, all without the Commission's approval. When ratifiers adopted the 1963 Constitution, they did not change the Commission's authority or limit the Legislature's authority to continue to amend PA 240. But if the Court of Appeals was right in this case, not only did the Legislature lack the authority to amend the

pension system via the Act at issue here, 2011 PA 264, its reasoning would call into question the very existence of the Retirement Act and the constitutional validity of the scores of amendments thereto.

CLARIFICATION OF FACTS

Plaintiffs make a number of factual allegations inconsistent with history and the record. The most significant discrepancies are highlighted here.

First, contrary to Plaintiffs' assertion (Pls' Br, pp 4–5), the Commission did *not* establish the retirement plan for State employees. While the Commission adopted Rule XXXVIII to prepare a "contributory retirement system," it recognized that any system would have to be adopted by law, i.e. by the Legislature (*id.*, pp 5–6), which did so only after making extensive amendments to Senate Bill 292, which the Commission never approved.

Second, Plaintiffs assert that a 1979 Citizen Advisory Task Force recognized the Commission's authority to make rules governing conditions of employment and determinations on wages and employee benefits. (Pls' Br, pp 4–5.) But Plaintiffs fail to acknowledge that the Task Force specifically recommended that "[p]ensions should *remain a function of the Legislature*." (App 88a (emphasis added).)

Third, while the Commission recognized some disability retirements (Pls' Br, p 8), that was done under the authority granted to the Commission by the Legislature, through section 14(9) of 1939 PA 97. That is evident from the Commission's minutes of December 29, 1942, which ordered non-disabled employees to continue working until a retirement plan was enacted. (App 50b.) If the Commission had

the authority to retire those employees, there would not have been any reason to wait until the Legislature enacted PA 240 in 1943.

Fourth, Plaintiffs reference the 1963 Constitutional Convention debates in an attempt to show that the delegates wanted to maintain the Commission's authority to "fix rates of compensation." (Pls' Br, pp 9–12.) But the delegates did not add any language to the Constitution to prohibit the Legislature from amending PA 240 as it had done over 20 times before 1963.

Fifth, Plaintiffs also cite the Commission minutes of December 4, 1973, which purport to approve a non-contributory retirement plan. (Pls' Br, p 11.) But such a plan was not effective until months later when the Legislature enacted it in 1974 PA 216. (App 74b–74b; OAG, 1971–1972, No 4732, p 73 (December 29, 1971)).

Sixth, the two letters referenced by Plaintiffs (Pls' Br, pp 11–12) rely on OAG No 4732, which concluded that the Commission could adopt a "supplementary retirement plan" because the ratifiers of article 11, § 5 did not "intend to nullify the legislatively established state employees retirement system." *Id.* at 73. Moreover, in the letter of January 11, 1974, the Attorney General stated that the Commission did not have the "authority to adopt retirement systems." (App 72b.) Neither letter concludes that the Legislature is prohibited from amending PA 240. (App 71b–72b; 73b–74b.) And a February 16, 2011 letter (mentioned at App 79b–80b and attached here as Exhibit A), written by the Chief Deputy Attorney General, addressed benefits only for active employees; in fact, its first footnote specifically stated that it did not address the application of article 11, § 5 to retired employees.

Seventh, Plaintiffs assert that the Legislature made no substantive changes to PA 240 between 1974 and 2010. (Pls' Br, p 12.) In reality, the Legislature amended PA 240 over 60 times during that period. Most significantly, these changes included closing the pension plan and creating a *new* defined contribution retirement plan. 1996 PA 216, § 13 (3)(d) & § 50. Plaintiffs suggest that this new plan did not "impact" existing employees. But Plaintiffs ignore the fact that the Legislature gave existing employees the option to leave the pension plan and transfer to the defined contribution plan—and more than 3,000 employees chose to do so. The Commission never approved this dramatic change in PA 240. Nor did the Commission approve 1984 PA 3, 1991 PA 62, 1992 PA 64, 1996 PA 487, and 2002 PA 743, which allowed employees to increase their pension by retiring early.

Finally, Plaintiffs assert that they sought bargaining over retirement benefits in 2011 but that the State deferred to the Commission. (Brief, pp 13–14.) But, as Plaintiffs acknowledge, no such bargaining occurred.

ARGUMENT

I. The Legislature's authority to enact and amend a state employee pension plan is not subject to the Commission's control.

As relevant here, the Commission's constitutional sphere of authority is to "fix rates of compensation" and "regulate conditions of employment" for civil service employees. State employee pensions are neither "rates of compensation" nor "a condition of employment." None of Plaintiffs' cited cases (Pls' Br, pp 17–19) hold that the phrase "rates of compensation" includes pensions, or that the Legislature

lacked the authority to enact a retirement plan or amend that plan. If, as Plaintiffs suggest, the Commission had the exclusive and plenary authority to establish and amend a state-employee pension plan, legislation was unnecessary and in fact exceeded the Legislature's authority, a view that would render the Legislature's dozens of enactments void.[1] To accept the lower court's ruling is to accept that every action taken by the Legislature concerning state employee pensions, including the numerous "early out" plans, could also be set aside as an unconstitutional infringement on the Commission's sphere of authority. This is legally incorrect.

A. The fact that article 11, § 5 lists "compensation" and "pensions" as distinct items proves that compensation does not include pensions.

While paragraph 4 of § 5 gives the Commission authority to "fix rates of compensation," the very next paragraph—paragraph 5—lists "pensions" and "retirement" as separate items from "compensation." Const 1963, art 11, § 5 ("State Police Troopers . . . have the right to bargain collectively . . . concerning compensation, . . . retirement, pensions, and other aspects of employment . . . ."). To accept Plaintiffs' assumption that the word "compensation" means one thing in paragraph 4 and something different in paragraph 5 of the same section of the Constitution would be to accept that the ratifiers' decision to use different language in the two did not matter and that including pensions in paragraph 5 was empty surplusage.

---

[1] If the ratifiers had given the Commission the authority to enact a retirement plan, the Commission could not have delegated that authority to the Legislature and would not have needed to ask the Legislature to enact it. *Groehn v Michigan Corp & Secs Comm*, 350 Mich 250, 259; 86 NW2d 291 (1957).

Plaintiffs have no answer to this dispositive point, merely asserting in a footnote that the fact that paragraph 5 was added later (in 1978) "obviously" distinguishes the two. (Pls' Br, p. 31 n 14.) But "it is to be supposed that the same word is used in the same sense wherever it occurs in a constitution." 1 Cooley, Constitutional Limitations (8th ed), p 135. If anything, the fact that pensions were mentioned in 1978 as a benefit distinct from compensation tends to confirm that pensions were, in the mind of the ratifiers, different things.

B. Pensions are not a "rate of compensation."

The ratifiers of article 6, § 22 intended the phrase "fix rates of compensation" to give the Commission the authority to set the *wage rates* for various job classifications, not to establish a pension plan. As discussed in the State's opening brief, at the time of ratification, the term "compensation" was not commonly understood to include pensions. This fact is confirmed by the Commission's own 1942 Report to the Assembly wherein it stated that "Michigan state government has never had a pension plan for more than a handful of its employees." (App 19b.)

In arguing to the contrary, Plaintiffs essentially ignore the words "rates of" in the constitutional provision. Unlike pensions, wages and salaries are determined by a "rate," i.e., dollars per hour, or dollars per year. In contrast, pensions are determined by a formula incorporating numerous factors. Article 6, § 22's plain text—"fix rates of compensation"—evinces an intent to give the Commission the authority to establish pay schedules for each of the various positions in state civil service, not to create or regulate a pension system.

Furthermore, Plaintiffs' claim that the Commission possesses supreme and exclusive control over pensions is belied by the fact that PA 240 vested "the responsibility for making effective the provisions of this act" and "the authority to make all rules and regulations necessary therefore" in an autonomous retirement board, which lacked any Commission representation. PA 240, § 2. In addition to rule-making authority, the Legislature gave the Board various other duties, including the discretionary authority to define retirement "service" (PA 240, §1(i)) and to retire State employees on account of disability (PA 240 § 24). Under these facts, it strains common sense and logic for Plaintiffs to insist that the Commission ever possessed, let alone still retains, exclusive control over pensions.

The Attorney General Opinions relied upon by Plaintiffs (Pls' Br, pp 21–22) in regard to "rates of compensation" do not determine what the ratifiers of article 6, § 22 intended, do not apply the definition of "rates of compensation" as it existed in 1940, and do not consider why article 6, § 22 was adopted. In addition, Plaintiffs ignore that the Attorney General did *not* conclude that article 6, § 22 or article 11, § 5 prohibited the Legislature from amending PA 240, but instead concluded that "the framers of the 1963 Constitution did not intend to divest the legislature of a power [to enact a retirement plan] it had exercised prior to its adoption." OAG, 1971–1972, No 4732, p 72.

Further, the Attorney General offered this opinion well before the Court of Appeals' decisions in *Jones v Department of Civil Service*, 101 Mich App 295; 301 NW2d 12 (1980), and *Oakley v Department of Mental Health*, 136 Mich App 58; 355

NW2d 650 (1984), where the Court held two statutes constitutional, despite the fact that they authorized compensation different than what was approved by the Commission. Finally, contrary to Plaintiffs' argument, the Attorney General never opined that the Commission could have established its own retirement plan, to the exclusion of the Legislature, but only that it could adopt a "supplementary retirement plan." OAG 1971–1972, No 4732, p 72.

The only cases Plaintiffs cite that actually discuss the Commission's authority to "fix rates of compensation" involve laws passed by the Legislature that reduced the rates of compensation approved by the Commission. *Civil Serv Comm v Auditor General*, 302 Mich 673, 686-687; 5 NW2d 536 (1942); *AFSCME Council 25 v State Employees Ret Sys*, 294 Mich App 1, 24–25; 818 NW2d 337 (2011). Here, §§ 1e, 35a(1) and 50a(1) and (2) do not reduce the rates of compensation approved by the Commission. Instead, members who voluntarily elect under § 50a to continue participating in the pension plan must make the attendant 4% contribution provided under § 35a which, in any event, does not affect, let alone reduce, the *rate* at which they are compensated, but only their take-home pay.[2] And § 1e does not interfere with Commission-established pay rates, or diminish members already accrued pension benefits; it merely specifies how *future* overtime pay will factor into *future* pension benefits.

[2] This voluntary election is very similar to the voluntary election that members could make to purchase service credit in the past. MCL 38.17g, 17h, 17i, 17l, 17m, and 17n. It is also similar to sections 13(3)(d) and 50 of 1996 PA 487. If PA 264 is unconstitutional, then all of these statutes are unconstitutional.

AFSCME Council 25 is also different because there the Legislature *mandated* a 3% contribution to balance the budget, which effectively negated the 3% pay increase that the Commission fixed and that the Legislature failed to reject. (Pls' Br, p 19.) In contrast, here the 4% contribution is voluntary and unconnected to a pay increase approved by the Commission. In addition, while the Commission cooperated in other cases with the Governor's office to suspend its rules to allow for a six-day layoff program and to rescind a pay increase to save State revenue (Pls' Br, pp 33–34), that does not establish the legal principle that the Legislature has to seek the Commission's approval before it amends a law that it enacted without the Commission's approval. Thus, this alleged cooperation, referenced in *AFSCME Council 25*, does not prohibit this Court from finding PA 264 constitutional.[3]

Plaintiffs go on to argue that article 4, § 48 of the 1963 Constitution explicitly recognizes the limitation of the Legislature's power over State employees. (Pls' Br, pp 27–28.) But § 48 merely prohibits the Legislature from enacting laws providing for the resolution of *disputes* concerning State employees. There is no similar explicit prohibition on the Legislature in enacting a pension plan or amending it. Moreover, both the 1908 and 1963 Constitutions prohibit the Commission from exercising legislative power unless the grant of such power is "expressly provided" in the Constitution. Const 1908, art 4, § 2; Const 1963, art 3, § 2. As discussed in the State's brief and in *UAW v Green*, such an omission is significant.

[3] The Court of Appeals decision in *Attorney General v Civil Service Commission*, unpublished opinion per curiam, Jan 8, 2013 (Docket No. 306685), is also off-point because it did not address the Legislature's authority over retirement benefits.

Plaintiffs also assert that *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295; 806 NW2d 683 (2011), supports their contention that pensions are "deferred compensation" and, thus, subject to the Commission's exclusive control. (Pls' Br, p 36.) But that statement explains the purpose of the Pension Clause, article 9, § 24, not whether the Commission has the authority to establish a pension plan under article 11, § 5.

C. The Commission's authority to regulate civil service employment does not trump the Legislature's authority to enact laws concerning state employee pensions.

The Court of Appeals conclusorily held that a pension plan was a "condition of employment" over which the Legislature had no authority. But even though that conclusion would help the State (because, as explained in *UAW v Green*, the Legislature *does* have authority over conditions of employment), pensions are not a condition *of* employment. It follows that a voluntary contribution to a pension plan cannot be construed as a condition of employment, but a condition of accruing future pension benefits. Further, PA 264 applies not only to civil service employees but also non-civil service employees of the retirement system. Thus, PA 264 was a proper exercise of the Legislature's authority to enact laws and is not incompatible with article 11, § 5 and the Commission's authority thereunder.

RELIEF REQUESTED

The State respectfully requests that the Court reverse the Court of Appeals and affirm the constitutionality of sections 1e, 35a, and 50a of 2011 PA 264.

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Matthew Schneider (P62190)
Chief Legal Counsel

Larry F. Brya (P26088)
Special Assistant Attorney General

Patrick M. Fitzgerald (P69964)
Frank J. Monticello (P36693)
Joshua O. Booth (P53847)
Assistant Attorneys General
Attorneys for State of Michigan
Defendants–Appellants
State Operations Division
P.O. Box 30754
Lansing, MI 48909
(517) 373-1162

Dated: May 21, 2014
2012-0004286-C

EXHIBIT A

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL

P.O. Box 30212
LANSING, MICHIGAN 48909

BILL SCHUETTE
ATTORNEY GENERAL

February 16, 2011

Honorable Rick Jones
State Senator
The Capitol
Lansing, MI 48909

Dear Senator Jones:

Attorney General Schuette has asked me to respond to your letter in which you ask whether the Civil Service Commission's recent decision authorizing current classified employees to enroll an unrelated adult in the State Health Plan constitutes an increase in the rate of compensation for current classified employees that is subject to rejection or reduction by a vote of the Legislature under Const 1963, art 11, § 5.[1] Due to the subject matter of the request, I asked staff familiar with this issue to review your letter. The following represents their findings.

On January 26, 2011, the Civil Service Commission (Commission) approved letters of understanding for certain bargaining units that would allow represented employees in the classified civil service, who do not have an eligible spouse, to enroll one unrelated adult, and that adult's dependents, in the State Health Plan, provided that certain eligibility criteria are met.[2] At

[1] This letter does not address the application, if any, of art 11, § 5 to retired classified employees. Your letter also posed a question involving the application of Const 1963, art 1, § 25. Given your request for expedited treatment of the first question, this letter does not address the constitutional issue raised by the second question.

[2] The letter of understanding provides the following:

> Where the employee does not have a spouse eligible for enrollment in the State Health Plan, the Plan shall be amended to allow a participating employee to enroll one Other Eligible Adult Individual, as set forth below:
>
> To be eligible, the individual must meet the following criteria:
>
> 1. Be at least 18 years of age.
> 2. Not be a member of the employee's immediate family as defined as employee's spouse, children, parents, grandparents or foster parents, grandchildren, parents-in-law, brothers, sisters, aunts, uncles or cousins.
> 3. Have jointly shared the same regular and permanent residence for at least 12 continuous months, and continues to share a common residence with the employee other than as a tenant, boarder, renter or employee.
>
> Dependents and children of an Other Eligible Adult Individual may enroll under the same conditions that apply to dependents and children of employees.
>
> In order to establish that the criteria have been met, the employer will require the employee and Other Eligible Adult Individual to sign an Affidavit setting forth the facts which constitute compliance with those requirements. [Letter of Understanding, Article 43 Section C, Administrative Support and Human Services Units, December 2010.]

the same time, the Commission adopted a rule providing the same option to non-exclusively represented employees.

The Civil Service Commission has authority under Const 1963, art 11, § 5 to "fix rates of compensation" and "regulate all conditions of employment in the classified service":

> The commission shall classify all positions in the classified service according to their respective duties and responsibilities, *fix rates of compensation* for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive examination and performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the classified service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service. [Emphasis added.]

However, art 11, § 5 further provides that any increases in rates of compensation authorized by the Commission "may be effective only at the start of a fiscal year and shall require prior notice to the governor," who must "transmit such increases to the legislature as part of his budget." After transmission by the Governor:

> The legislature may, by a majority vote of the members elected to and serving in each house, waive the notice and permit increases in rates of compensation to be effective at a time other than the start of a fiscal year. *Within 60 calendar days following such transmission, the legislature may, by a two-thirds vote of the members elected to and serving in each house, reject or reduce increases in rates of compensation authorized by the commission.* [Const 1963, art 11, § 5.]

This provision gives the Legislature oversight of the Commission's requested compensation increases in light of existing budgetary and fiscal constraints, and to reject or reduce the rate increases upon a two-thirds vote of both houses of the Legislature.

You ask whether allowing current employees in the classified civil service to enroll an additional adult, and potentially that adult's dependents, into the State Health Plan constitutes an increase in the "rates of compensation" provided to classified employees that is subject to reduction or rejection by a two-thirds vote of the Legislature.

The language in Const 1963, art 11, § 5,[3] is identical to that found in Const 1908, art 6, § 22, giving the civil service commission the authority to fix "rates of compensation." In its

---

[3] Const 1908, art 6, § 22 provided, in part:

> The commission shall classify all positions in the state civil service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the state civil service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the state civil service . . . .

review of Const 1908, art 6, § 22, this office concluded that the Commission's authority to "fix rates of compensation" included the ability to provide for life insurance and health benefits for the classified service as a component of "compensation." See 1 OAG, 1959-1960, No 3413, p 206 (October 12, 1959). OAG No 3413 opined "[t]he constitution does not designate that the medium of compensation must be solely in the form of money." *Id.* at 208. Similar conclusions have been reached in other opinions by this office.[4]

Thus, the term "compensation" as used in art 11, § 5 also includes fringe benefits such as health care benefits, including benefits extended to persons residing with a current classified employee. Moreover, it is clear the Commission's decision to allow eligible classified employees to add one or more additional persons to the State Health Plan constitutes an "increase" in the rate of "compensation" accorded current classified employees under art 11, § 5.

In summary, the Civil Service Commission's decision to allow current classified employees to enroll an additional adult and dependents into the State Health Plan constitutes an increase in the rate of compensation, and as such requires notice to the Governor, inclusion in his proposed budget transmitted to the Legislature, and may be rejected or reduced within 60-days of transmission of the budget by a two-thirds vote of the members elected to and serving in each house of the Legislature.

Sincerely yours,

Carol L. Isaacs
Chief Deputy Attorney General

[4] Other opinions of this office have concluded that the word "compensation" includes fringe benefits, such as health care benefits. See OAG, 1971-1972, No 4732, p 66 (December 29, 1971); OAG, 1977-1978, No 5313, p 479 (June 14, 1978) (a prohibition against the receipt of compensation by a community college trustee prohibits the receipt of free tuition); OAG, 1977-1978, No 5255, p 327 (January 18, 1978) (compensation is a generic term encompassing salaries and fringe benefits.) See e.g., *Holmes v State Officers Compensation Comm,* 57 Mich App 255; 226 NW2d 90 (1974) (interpreting the term "salaries" as used in Const 1963, art 4, § 12).